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Supreme Court, U.S.
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No.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 198

RICHARD R. MUTH, SR., Petitioner

v.

CHRISTINA M. SHOWERS

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

Robert David Bacher
53 North Duke Street
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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 198

No.

RICHARD R. MUTH, SR., Petitioner

v.

CHRISTINA M. SHOWERS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Richard R. Muth, Sr., the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on August 9, 1985.

QUESTION PRESENTED

Has there been a denial of due process where the State of Pennsylvania has refused to order at least one blood test to a defendant in a child support case because said defendant had previously signed a statement admitting paternity?

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OPINIONS BELOW

The Supreme Court of Pennsylvania entered an Order denying the Petition For Allowance of Appeal in this case but did not issue an opinion. A copy of the notification of said Order that was provided to Petitioner's counsel is contained in the Appendix, infra.

The Superior Court of Pennsylvania issued a memorandum opinion which was filed but not published. See Pa. Super. , 494 A2d 429 (1985). A copy of said opinion is set forth in the Appendix, infra.

The Court of Common Pleas of Lebanon County, Pennsylvania also issued a written opinion in this case. That opinion is unreported. A copy of it is also contained ir the Appendix, infra.

JURISDICTION

The order of the Supreme Court of Pennsylvania was entered August 9, 1985. The jurisdiction of this Court is invoked pursuant to 28 USC §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the due process clause of the Fourteenth Amendment to the Constitution of the United States, which provides in part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

The petitioner is the defendant in a child support case involving one child, Scott Muth. The petitioner denies that he is the father of the child and, accordingly, has advanced numerous requests for a blood test involving the mother, the child, and

himself. The petitioner's first such request was presented to the local trial court on July 28, 1969. It was denied by order of the local trial judge on September 30, 1969. The petitioner requested a blood test three more times (in 1973, 1979, and most recently in 1983) and received a negative answer each time. Consequently, although this case is now more than sixteen years old, and despite the fact that the petitioner has asked on four separate occasions to have a blood test, there has never been even a single blood test of any type.

Petitioner's most recent request for a blood test was made April 14, 1983 before a Domestic Relations Hearing Officer. At that time petitioner's counsel stated

> I suppose that what I want to do, for purposes of the record, is make a specific objection to even continuing from this point

> on and enter a request that a blood test could be taken before any further testimony is given or any further evidence is given in the case.

The objection was denied, and the hearing went forward. Petitioner's counsel then filed in the trial court written exceptions to the findings of the Domestic Relations Hearing Officer in which he stated

> Defendant excepts to paragraph 5 of the findings of fact in which the hearing officer determined that the issue of paternity is res judicata and therefore not at issue in this case. To the contrary, during the Domestic Relations Office conference, conducted in accordance with Pennsylvania Rule of Civil Procedure 1910.11(a) through (d), the defendant specifically stated that he is not the father of the child and that paternity is therefore very much in issue in this case.

Petitioner's counsel additionally filed a brief in support of the exceptions in which he argued that the petitioner has a Fourteenth Amendment due process right

to have a blood test. Petitioner's counsel stated (inter alia)

> [T]he alleged father has a Fourteenth Amendment due process right to a blood test . . . [T]he right to a blood test is a "basic right."

Petitioner's exceptions were denied by the trial court in an opinion and order by the trial judge. A copy of said opinion and order is contained in the Appendix, infra.

Petitioner's counsel then filed a Notice Of Appeal in the Pennsylvania Superior Court, together with a brief in support thereof. In the brief petitioner's counsel again argued that the petitioner has a Fourteenth Amendment due process right to have a blood test, and he again stated (inter alia)

> [T]he alleged father has a Fourteenth Amendment due process right to a blood test . . . [T]he right to a blood test is a "basic right."

The Pennsylvania Superior Court denied the appeal by order and memorandum opinion, copies of which are contained in the Appendix infra.

Petitioner's counsel then filed a Petition For Allowance Of Appeal in the Pennsylvania Supreme Court in which he stated (inter alia)

> It is the petitioner's argument that he has a fundamental right to obtain at least one blood test, based upon constitutional considerations that outweigh the rules of res judicata. The Pennsylvania Supreme Court has not yet ruled on this issue.

The Pennsylvania Supreme Court denied the appeal. A copy of the notification of the denial that was provided to Petitioner's counsel is contained in the Appendix, infra.

REASONS FOR GRANTING WRIT

The refusal by the State of Pennsylvania to order at least one blood test violates the due process clause of the federal Constitution. This Court has already ruled that a State's failure to provide a blood test to an indigent defendant in a paternity case constitutes a violation of due process. Little v. Streater, 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981). Subsequent cases, citing Little v. Streater, have underscored the importance and accuracy of modern blood testing procedures:

> Recent advances in scientific techniques now enable the properly equipped laboratory to routinely provide attorneys and their clients with 95-98 percent probability of excluding a man falsely accused of paternity.

Picket v. Brown, 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed2d 372 (1983), fn 16. See also, Mills v. Habluetzel, 456 U.S. 1, 102 S.Ct. 1549, 71 L.Ed2d 770 (1982), fn 4, and fn 2 in concurring opinion.

To be sure, the petitioner in Little v. Streater had been denied a blood test by the lower court because he was indigent, whereas the Petitioner in the instant case was denied a blood test because the issue of paternity was rendered res judicata, under Pennsylvania law, due to the fact that the petitioner signed a document in 1967 in which he admitted paternity.* Consequently, this case involves a conflict between the due

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*The document referred to is captioned "Petition For Support Order." A copy of it is contained in the Appendix, infra.

process right of the petitioner to have at least one blood test versus the interest of the State of Pennsylvania in preserving the concept of res judicata in this case.

This Court has recognized that State action which results in either the creation or dissolution of the parent-child relationship must comply with standards of fairness. In the Little v. Streater case, supra. this Court stated

> The private interests implicated here are substantial. Apart from the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the possible sanctions for noncompliance, at issue is the creation of a parent-child relationship. This Court frequently has stressed the importance of familial bonds, whether or not legitimized by marriage, and accorded them constitutional protection [citation omitted]. Just as the termination of such bonds demands procedural fairness [citation omitted], so too does their imposition. Through

> the judicial process, the State properly endeavors to identify the father of a child born out of wedlock and to make him responsible for the child's maintenance. Obviously, both the child and the defendant in a paternity action have a compelling interest in the accuracy of such a determination. At 13.

Given, then, that both the child and the defendant in a paternity case have a compelling interest in the accuracy of the determination, together with the fact that modern blood test technology has become highly accurate, the petitioner in the instant case should be granted an opportunity to argue his case before this Court, i.e., that his due process right to a blood test is greater than the State interest in preserving the res judicata status in this case.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

OPINION OF THE SUPERIOR COURT

OF PENNSYLVANIA

CHRISTINA M. SHOWERS	:	NO. 222
	:	
v	:	HARRISBURG
	:	
RICHARD R. MUTH, SR. Appellant	:	1983

Filed: March 29, 1985

MEMORANDUM:

This appeal arises from the Order of the lower court denying appellant's petition to terminate child support for his son. Appellant has preserved for review the two issues stated in his brief: (1) was it error for the trial court to affirm the recommendation of the hearing officer in which the appellant's request for the HLA blood test was denied, and (2) was it error for the trial court to affirm the hearing officer's finding of fact that Scott Muth is incapable of gainful employment

in order to help defray the costs of his continuing education at the Pillsbury Bible College.

We have examined the record, the applicable law and the arguments of the respective parties. The Opinion of the lower court dated June 16, 1983, authored by the Honorable Robert J. Eby, properly analyzes this case and correctly disposes of the contentions raised on appeal. See also R.J.K. v. B.L., 279 Pa. Super. 71, 420 A.2d 749 (1980). The duty of a parent to support a child while in college has been clearly established where, as here, the child has the capacity and it does not impose an undue hardship on the parent. Commonwealth ex rel. Ulmer v. Sommerville, 200 Pa. Super. 640.190 A.2d 182 (1963). We add to the lower court's discussion that like Palchinski where the petitioner had the opportunity to demand blood tests

but neglected to do so, appellant, too, did not avail himself of the same opportunity prior to entering into the amicable order of support dated February 10, 1967, which decided the issue of paternity. We note that there is no allegation of fraud or mutual mistake which might permit us to review the issue of paternity.

Order affirmed.

APPENDIX "B"

ORDER OF THE SUPERIOR COURT

OF PENNSYLVANIA

CHRISTINA M. SHOWERS	:	NO. 222
	:	
v	:	HARRISBURG
	:	
RICHARD R. MUTH, SR. Appellant	:	1983

Dated: March 29, 1985

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the Order of the Court of Common Pleas of Lebanon County is affirmed.

s/ Mildred E. Williamson
Deputy Prothonotary

March 29, 1985

APPENDIX "C"

OPINION OF THE COURT OF

COMMON PLEAS OF LEBANON

COUNTY, PENNSYLVANIA

CHRISTINA M. SHOWERS	:	NO. 1530
	:	
v	:	of 1982
	:	
RICHARD R. MUTH, SR.	:	Family Division

Dated: June 16, 1983

At issue before the Court is the prospective modification of the Order of this Court dated February 20, 1980 directing the Defendant Richard R. Muth, Sr. to pay the sum of $20.00 per week for the support of Scott Muth and, in addition thereto, to be responsible for designated health insurance costs and specified medical expenses. As a result of the child attaining the age of eighteen years on October 14, 1982, the Defendant/Petitioner presented a

petition the Court requesting relief from the prior order.[1]

Following a hearing held on April 14, 1983 before the Domestic Relations Hearing Officer, that Officer recommended to the Court the denial of the Defendant's request for termination of the support order. On behalf of the Defendant, timely exceptions were filed to that recommendation. We have enjoyed the benefit of both brief and oral argument on behalf of counsel for both parties.

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1. Defendant's petition noted that the object of the support order was planning to continue his education beyond high school. In his request for modification, Defendant recites only that, "Petitioner desires some evidence to prove this and a complete explanation of all costs." (Petition for Modification, Paragraph 4). The matter was treated by the Hearing Officer as a petition for termination without objection by the Plaintiff. In the interest of judicial economy, this opinion will proceed upon that basis.

For the reasons that follow, we find the Defendant's exceptions to be somewhat less than meritorious and we will affirm the recommendation of the Hearing Officer. Our discussion of the exceptions as presented will be the order filed.

I.

It is without dispute that, although Scott Muth has attained the age of presumptive emancipation, he is a full-time student at Pillsbury Baptist Bible College in Owatonna, Minnesota.[2] Defendant's first objection to the Hearing Officer's finding is that Scott Muth is capable of part-time employment while pursuing his studies. This argument flies in the face of the testimony presented at the hearing.

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2. See Exhibit 2 presented into evidence at the hearing before the Hearing Officer.

Physically, there is considerable question as to this young man's ability to engage in employment while attending school. Upon direct examination of the Plaintiff, the following was revealed:

"Q . . . Now, does your son have any medical problems?

A. Yes, he does. He has polycistic kidneys.

Q. And has he been treated recently for that?

A. Yes, he had. He had been out to the Mayo Clinic out in Minnesota.

Q. Has that been recently?

A. Yes, it has, because I have the bills to pay yet." (N.T. 26).[3]

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3. The record reflects that the existence of the kidney ailment is not a new development but was considered when contained in a prior proceeding filed in November of 1979 for modification of the Order of Support in this matter.

When queried on the specific nature of Scott's disorder on cross-examination, it was explained:

"Q Okay. Is he physically able to work? I'm not sure what this polycystic kidney is.

A. Well, there isn't a lot of things he can do, being his kidneys are quite enlarged right now . . ." (N.T. 29).

In addition, Mrs. Showers discussed Scott's academic regimen:

"Q. Do you know how many classes he's taking at this time?

A. I don't know, but he had a very full schedule.

Q. Right. Well, would that be five classes of three hours each or --

A. I can't help you with that. All I know is he said he took more this year than he should have. He had a very full schedule that he had to do a lot of studying." (N.T. 31-32).

In spite of that schedule and his restraining physical condition, apparently Scott has sought part-time employment to help with the expenses. On cross-examination, Mrs. Showers further indicated:

"Q. Is Scott working any kind of a part-time job after his classes or in the evenings or on weekends at this time?

A. No. They had applied for jobs, but they couldn't.

Q. . . .

A. . . .

Q. . . . He applied for jobs?

Q. They had applied for jobs, but they weren't called. You know, they didn't get in any place.

Q. Do you know what kind of jobs he applied for?

A. I imagine they went to some of these fast food places out there like

McDonald's and that because I know a girl was gonna try to help him to get in, but he didn't get in." (N.T. 31).

Clearly, in words probably very familiar to those in residence at the Pillsbury Bible College, Scott Muth has gone the extra mile in attempting to alleviate some of the expenses associated with his higher education. The fact that he was unable to secure such employment will not stand to relieve the Defendant of his obligation of support.

II.

The Defendant's second area of contention resolves around his request for the conduct of blood tests to determine the paternity of Scott Muth and the determination of the Hearing Officer that that issue is res judicata because of the prior proceedings in the instant case. A brief reviewed of the prior proceedings in this matter is helpful and

clearly shows that the determination by the Hearing Officer is demanded by this record.

Scott Muth was born on October 14, 1964. Little more than two years later, an amicable petition for support order for Scott and two other children of the parties was presented to this Court by the parties herein. That petition, inter alia, provided in paragraph 2 thereof as follows:

> "2. That your Petitioner and Respondent are the parents of the following children: Richard 8/24/57, Richie 10/8/56, Scott 10/14/64."

The petition was executed and acknowledged by the Defendant herein. Pursuant to the presentation of that amicable petition, on February 10, 1967, this Court entered an Order of Support for the three children against Richard R. Muth, Sr., Defendant herein, for the sum of $35.00

per week.[4] No appeal was ever taken from that Order of Court.

Subsequently, this Order was the subject of review by the Court on at least five separate occasions each of which resulted in an order from which an appeal could have been lodged with the Appellate Courts. No appeals were ever filed from any of the determinations of this Court by this Defendant.

On two specific occasions my learned colleagues have addressed this Defendant's request for blood tests not materially unlike that presented herein. By Order of December 10, 1973 and Opinion attached thereto, the Honorable L.E. Meyers refused to direct such a testing procedure requested in response to a petition for an increase of the Order theretofore

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4. See Exhibits "A" and "B" attached to Defendant's Brief.

entered. No appeal was taken from that Order.

On December 5, 1979 the Defendant presented another motion requesting the directing of blood grouping tests. Without a hearing and pursuant to a Memorandum Opinion filed by the Honorable G. Thomas Gates, President Judge of this Court, that petition was refused.[5] President Judge Gates Noted in his Memorandum Opinion that, "A support order unappealed establishes paternity and precludes the petitioner's request for Blood Grouping Tests." That statement was an accurate reflection of the law of this Commonwealth in 1979 and remains so to this day.

As a tribute to the Defendant's tenacity or, more accurately, his refu-

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5. See Exhibits "K" and "L" of the Defendant's brief.

sal to accept "no" as an answer, this Defendant once again asks this Court to direct that blood test be performed to assist him in his challenge of the paternity of his now eighteen year old son. In 1967 Mr. Muth acknowledged in a sworn document that he was the father of Scott Muth. In a half dozen occasions since that time, the Defendant has foregone the opportunity to appeal from a determination by this Court which was in accordance with his statement in 1967; i.e., that he was Scott's natural father. We cannot now permit him to contest what has been established ad nauseam.

Defendant incorporates within his argument that postulate that he should be afforded blood grouping analyses now because of the present existence of the HLA testing procedures. Unquestionably, with the advance of science and

technology, Courts have been aided when called upon to resolve issues of disputed paternity. In the instant case, however, we find argument of the existence of a new technology not available to the Defendant in 1967 unpersuasive.

As noted above, implicit in the entry of this Court's Order of February 10, 1967 was the adjudication that the Defendant here was the father of Scott Muth. As part of the proceedings, Defendant could have availed himself of the technology then available and requested blood tests under the Statute then in effect. This the Defendant did not do. Since paternity was a relevant fact serving as a prerequisite to the entry of that original order, under the doctrine of res judicata it cannot be challenged or put at issue in any subsequent proceeding. Nedzwecky v. Nedzwecky, 203

Pa. Super. 179, 199 A.2d 490 (1964).

In Palchinski v Palchinski, 253 Pa. Super. 171, 384, A.2d 1285 (1978), Judge Hoffman recited as follows:

> " . . . Our Court has held that a support order necessarily determines the issue of paternity. If a party wishes to challenge a finding of paternity, he must do so by appealing directly from the support order. In the abscence of an appeal, a finding of paternity is established as a matter of law." 384 A.2d 1285 at 1287."

This Defendant acknowledged in 1967 that he was the father of Scott Muth and requested this Court to enter a support order pursuant to that representation. We did so. The Defendant failed to appeal from that Order or from the numerous determinations which have been made since then in this matter. Mr. Muth has had so many bites at the apple, that we are afraid that there is nothing left but the core. Accordingly, we

find that res judicata operates to foreclose his challenge on the issue of paternity (once and for all!).

III.

The Defendant's final challenge to the Hearing Officer's recommendation is that the Order as entered in excessive. This argument is likewise without foundation simply because the Hearing Officer has not made any reccmmendation with regard to amount of a specific order. The action taken by the Hearing Officer was solely to recommend that the Defendant's petition which was treated as a petition to terminate the prior order be denied. The resulting effect is that the Order previously entered by this Court on February 20, 1980 calling for weekly support in the amount of $20.00 remains in full force and effect.

In any event, based upon the Defendant's testimony before the Hearing Officer the Order herein complained of is clearly not excessive. On direct examination, Mr. Muth acknowledged that he is employed and earned $23,750.24 in 1982. (N.T. 14). In addition, his present wife had been employed at Sterling Drug in Myerstown, Pa. for approximately six years but the Defendant claimed to have no idea of her income (N.T. 17-18). The Defendant also supports, in addition to his present wife, his step-daughter and son-in-law who live with him but are unemployed. Mr. Muth was examined with regard to his expense statement at the Hearing but we are without the benefit of the contents of that statement inasmuch as

it was never presented to be placed into evidence.[6]

We need recite no citation for the proposition that a parent has a continuing obligation to support his child beyond the age of presumed emancipation where that child pursues higher education and the parent is determined to have the means to make such contribution. Upon the evidence presented before the Hearing Officer, that officer would have been remiss to make any finding other than this young man was entitled to continuing support and that this Defendant had a continuing obligation to provide it.

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6. Interestingly, Plaintiff in her brief referred to the Defendant's income and expense statement and alleged that that statement, as prepared by the Defendant, indicated expenses of more than $700 per month for entertainment, vacation and Charitable contributions.

APPENDIX "D"

ORDER OF THE COURT OF

COMMON PLEAS OF LEBANON

COUNTY, PENNSYLVANIA

CHRISTINA M. SHOWERS	:	NO. 1530
	:	
v	:	OF 1982
	:	
RICHARD R. MUTH, SR.	:	FAMILY DIVISION

AND NOW, to wit, June 16, A.D., 1983, for the reasons set forth in the Opinion of even date herewith, the exceptions filed on behalf of the Defendant are respectfully refused and the Recommendation of the Hearing Officer is affirmed. The Defendant's motion for modification of the Order of this Court of February 20, 1980 is denied.

BY THE COURT,

s/ Robert J. Eby, J.
ROBERT J. EBY

APPENDIX "E"

COPY OF THE JUDGMENT TO BE REVISED

IN THE SUPREME COURT

OF PENNSYLVANIA

CHRISTINA M. SHOWERS	:	NO. 122 M.D.
	:	
v	:	Allocatur
	:	
RICHARD R. MUTH, SR.	:	Docket 1985

"August 9, 1985 Petition denied, per curiam."

APPENDIX "F"

COPY OF PETITION FOR SUPPORT ORDER

IN THE COURT OF QUARTER SESSIONS

LEBANON COUNTY, PENNSYLVANIA

CHRISTINA M. MUTH	:	
	:	NO. 43
v	:	
	:	OF 1967
RICHARD R. MUTH, SR.	:	

PETITION FOR SUPPORT ORDER

TO THE HONORABLE G. THOMAS GATES, PRESIDENT JUDGE OF SAID COURT:

The Petition of Christina M. Muth and Richard R. Muth, Sr. respectfully represents.

1. That your Petitioner, Christina M. Muth, resides at Cornwall, Pennsylvania and your Respondent, Richard R. Muth, Sr., resides at RD #3, Myerstown, Pennsylvania.

2. That your Petitioner and Respondent are the parents of the following children: Richard 8/24/57, Richie 10/8/56, Scott 10/14/64.

3. That your Petitioner and Respondent have agreed that the support for the three children should be $35.00 dollars per week.

4. That your Petitioner and Respondent have agreed that visitation rights should be Sundays from 1"00 p.m. to 6:00 p.m.

WHEREFORE, your Petitioner and Respondent respectfully pray your Honorable Court to grant an Order in accordance with the above Petition.

s/ Christina M. Muth
Petitioner

s/ Richard R. Muth, Sr.
Respondent

COMMONWEALTH OF PENNSYLVANIA :
: SS.:
COUNTY OF LEBANON :

Christina M. Muth, Petitioner, and Richard R. Muth, Sr., Respondent, being duly sworn according to law, depose and say that the facts set forth in the foregoing Petition are true and correct and those based on information from others are believed to be true.

s/ Christina M. Muth
Christina M. Muth

s/ Richard R. Muth, Sr.
Richard R. Muth, Sr.

Sworn to and subscribed before me this 14th day of February, 1967.

s/ _____
Notary Public
My comm. expires:
12/18/70
Lebanon, Lebanon
County, PA